

## PROFESSIONAL RESPONSIBILITY

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**53RD GRADUATE COURSE**  
**PROFESSIONAL RESPONSIBILITY FOR SUPERVISORS**

**Outline of Instruction**

**I. REFERENCES.**

A. Primary.

1. Army Regulation 27-26, *Legal Services - Rules of Professional Conduct For Lawyers* (1 May 92).
2. Dep't of the Air Force, TJAG Policy No. 26, *Rules of Professional Conduct* (February 4, 1998).
3. Dep't of the Navy, JAGINST 5803.1B, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General* (February 11, 2000).
4. Coast Guard Military Justice Manual, COMDTINST M5810.1D Art. 6.C.1 (August 17, 2000).
5. American Bar Association Model Rules of Professional Conduct.
6. The ABA Standards for Criminal Justice.
7. The ABA Code of Judicial Conduct.

B. Secondary.

1. AR 27-1, Judge Advocate Legal Services (30 Sep 96).
2. AR 27-3, The Army Legal Assistance Program (21 Feb 1996).
3. AR 27-10, Military Justice (6 Sep 2002).

4. American Bar Association Annotated Model Rules of Professional Conduct .
5. American Bar Association Model Code of Professional Responsibility.
6. OTJAG Standards of Conduct Office, *Professional Responsibility Notes* (published periodically in THE ARMY LAWYER). Also, check JAGC.Net for SOCO Professional Responsibility Opinions and Notes.

## II. INTRODUCTION.

## III. SELECTED ETHICAL ISSUES.

### A. Confidentiality (Rule 1.6).

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.
  - a. No distinction between confidences and secrets.
  - b. Applies to information obtained prior to formation of attorney-client relationship.
  - c. Applies after death of client. *Swidler & Berlin v. United States*, [66 U.S.L.W. 4538](#) (U.S. Jun. 25, 1998) (No. 97-1192).
  - d. The Supreme Court of Oregon upheld a one-year suspension from the practice of law of a National Guard attorney who improperly disclosed military personnel information to the press. TJAG revoked his credentials to practice law for the Army in connection with the case. *In Re Lackey*, 333 Ore. 215; [37 P.3d 172](#) (2002)

- e. Applies when reporting suspected judicial or lawyer misconduct. The Supreme Court of the State of Washington upheld a six-month suspension from the practice of law for attorney Schafer's disclosure of client confidences, concerning a judge, to the FBI, the prosecutor's office, the IRS and the press. *In Re Disciplinary Proceeding against Schafer*, (April 17, 2003) available at JACNET.

2. Exceptions to confidentiality.

a. Permissive.

- (1) A client may consent to disclosure of confidences (Rule 1.6). *See also* AR 27-3, para. 4-8a.
- (2) Disclosure is also authorized in order to carry out the representation.
- (3) Disclosure is permitted to establish a claim or defense in a controversy with a client.
- (4) Air Force Rules.

Air Force Rule 1.6(b)(1) leaves to the discretion of the lawyer (*i.e.*, lawyer *may* reveal...) the disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm, or which will substantially impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

b. **Mandatory** for Navy/Marine Corps and Army.

Rule 1.6(b)(1) mandates disclosure of (*i.e.*, lawyer *shall* reveal...) information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm, or to prevent a client from committing a crime which will substantially impair the

readiness or capability of a military unit, vessel, aircraft, or weapon system.

- c. There is no authority for revealing information of other potential offenses or past offenses under the Rules.

B. Conflicts of Interest (Rules 1.7, 1.8 & 1.9).

- 1. **Directly adverse to the current client.** A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:

- a. The lawyer reasonably believes the representation will not adversely affect the other relationship, and
- b. Each client consents after consultation (Rule 1.7(a)).
- c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw.
- d. Potential conflicts in legal assistance:
  - (1) Estate planning.
  - (2) Debtor-creditor and seller-purchaser. *Compare Atlantic Richfield Co. v. Sybert*, [456 A.2d 20](#) (1983) (no conflict), with *Hill v. Okay Construction Co.*, [256 N.W. 2d 107](#) (1977) (conflict).
  - (3) Domestic relations. *Coulson v. Coulson*, [448 N.E.2d 809](#) (1983); *Ishmael v. Millington*, [241 Cal. App. 2d 520](#), 50 Cal. Rptr. 592 (1966).

- e. Imputed Disqualification (Rule 1.10). Lawyers working in the same military law office are not automatically disqualified from representing a client. A *functional analysis* is required. Army policy may discourage representation of both parties in certain instances. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute **discouraged**).
- f. Potential conflict in criminal practice - representing multiple accused.
  - (1) Ordinarily a lawyer should refuse to act for more than one of several co-defendants (Comment to Rule 1.7). *See* ABA Standards for Criminal Justice 4-3.5(b). *See also United States v. Newak*, [24 M.J. 238](#) (C.M.A. 1987) (counsel's joint representation of co-accused constituted ineffective assistance of counsel).

(2) Consult your respective service policy on how to handle the co-accused situation. In the Army, consult AR 27-10 and USATDS SOP. Generally:

- (a) Co-accused will initially be contacted by separate defense counsel.
- (b) Co-accused may submit request for the same individual military counsel.
- (c) Chief, USATDS, decides whether to grant the request. No request will be granted unless each co-accused has signed a statement reflecting informed consent to multiple representation and it is clearly shown that a conflict of interest is not likely to develop.

2. Representation materially limited.

- a. A lawyer is also precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests (Rule 1.7(b)). **Example:** Defense counsel materially limited by loyalty to Army - result is ineffective assistance of counsel. *United States v. Bryant*, [35 M.J. 739](#) (A.C.M.R. 1992).
- b. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest **and** the client consents after consultation.

3. **Business transactions.** A lawyer shall not enter into a business transaction with a client (Rule 1.8).

4. **Former client.** A lawyer who has represented a former client shall not thereafter represent another person in the same matter or use information to the disadvantage of a former client (Rule 1.9).

C. Terminating the Relationship. (Army Rule 1.16)



1. Notwithstanding any other provision of the rule, a lawyer shall continue the representation when ordered to do so by a tribunal or other competent authority.
2. A lawyer SHALL seek withdrawal (or not commence representation) if -
  - a. the representation will violate the rules
  - b. the lawyer's physical or mental condition materially impairs her ability to represent the client; OR
  - c. the lawyer is dismissed by the client.
3. A lawyer MAY seek withdrawal if it can be accomplished without material adverse affect to the client's interests OR -
  - a. the client persists in a course of action which the lawyer reasonably believes to be criminal or fraudulent;
  - b. the client has used the lawyer's services to perpetrate a crime or a fraud;
  - c. the client persists in pursuing an objective which the lawyer considers repugnant or imprudent; OR
  - d. other good cause for withdrawal exists.
    - (1) Good cause to withdrawal may arise when a Reserve Component Officer is ordered to active duty for more than 30 days. Army Regulations generally prohibits Judge Advocates from practicing law in the private sector while on active duty.

- (2) An attorney of the JALS will not engage in private law practice without the prior written approval of TJAG. . This requirement does not apply to RC members of the JALS unless they are ordered to active duty for more than 30 consecutive days. See AR 27-1, Judge Advocate Legal Services, paragraph 4-3.

D. Handling Evidence or Contraband (Rule 3.4(a)).

1. If the client informs the lawyer of the existence of the evidence but **does not relinquish possession**:
  - a. Lawyer should inform the client of the lawyer's legal and ethical obligations regarding the evidence.
  - b. Lawyer should refrain from either taking possession or advising the client what to do regarding the evidence (*See* USATDS SOP, para 1-13).
2. If the **lawyer receives** the evidence or contraband.
  - a. A lawyer shall not:
    - (1) Unlawfully obstruct another party's access to evidence;
    - (2) Unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; or
    - (3) Assist another person to do so.
  - b. A lawyer who receives an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities **when required by law or court order** (Comment, Rule 3.4(a)). *United States v. Rhea*, [33 M.J. 413](#) (C.M.A. 1991) (defense counsel have duty to surrender evidence which implicates their clients).

- c. If a lawyer receives **contraband**, the lawyer has no legal right to possess it and must always surrender it to lawful authorities. (Comment, Rule 3.4).
  - d. If a lawyer receives **stolen property**, the lawyer must surrender it to the owner or lawful authority to avoid violating the law. (Comment, Rule 3.4).
  - e. Concealment, destruction, alteration, etc., could be a violation of UCMJ art. 134, Obstruction of Justice.
3. If the lawyer discloses the location of or delivers an item of physical evidence to proper authorities, it should be done in a way designed to protect the client's interests, including:
- a. Client's identity.
  - b. Client's words concerning the item.
  - c. Client's privilege against self-incrimination.
  - d. Other confidential information.
4. Advice on handling evidence or contraband:
- a. Do not accept the item!
  - b. Advise the client of the consequences of continued possession and voluntary turn-in. Do not advise the client of what to do regarding the evidence. Also, advise the client of the lawyer's obligations regarding the evidence.
  - c. If possession cannot be avoided, turn it in to the proper authorities.
    - (1) Do not dispose of it or conceal it.
    - (2) Do not destroy or alter the evidentiary quality.

- (3) Upon turn-in, refuse to disclose client identity and circumstances of your possession to the extent permitted by applicable case law.

- d. There is no protection from court-ordered disclosure.

E. Client perjury (Rule 3.3; ABA Formal Opinion 57-353 (1957)).

1. **Former ABA position.** Allow client to testify in narrative form and not use the testimony in argument.
2. **Current position.** A lawyer who knows that his or her client intends to testify falsely must . . .
  - a. Advise the client not to do so and explain the consequences of doing so, including the lawyer's duty to disclose.
  - b. Attempt to withdraw (if the lawyer's efforts to dissuade the client from testifying falsely are unsuccessful).
  - c. Limit examination to truthful areas or do not call the client to testify at all.
  - d. If above not possible, disclose to the tribunal the client's intention to commit perjury.
  - e. If perjury has already been committed, persuade the client to rectify it.
  - f. Disclose the perjury if unsuccessful.
3. A lawyer "knows" that a client intends to testify falsely if the accused has admitted facts to the lawyer that establishes guilt and the lawyer's independent investigation establishes that the admissions are true, but the accused insists on testifying. (Comment, Rule 3.3).

4. A lawyer may also refuse to offer evidence that the lawyer reasonably believes is false. (Rule 3.3(c)).

F. The Service As The Client (Rule 1.13).

1. The respective service, acting through its duly authorized officials, is the client. Army lawyers may be authorized to represent individual clients as legal assistance attorneys or trial defense service lawyers.
2. Attorney-client relationship exists between the lawyer and the service -
  - a. As represented by the commander or head of the organization.
  - b. As to matters within the scope of the official business of the organization.
  - c. Commander or head of organization cannot invoke attorney-client privilege for his or her own benefit.
    - (1) Communications between a commander and an SJA may be disclosed to the commander's superiors and to investigators appointed by the superior.
    - (2) Advice to a commander from the SJA is protected from disclosure to opposing civilian counsel. However, the same advice may be disclosed to the commander's superior or delegated investigators if there are allegations of impropriety or misconduct.
    - (3) DA IG investigators commonly interview legal advisors and often the SJA's testimony is critical to the resolution of an allegation of impropriety or misconduct. See the CSA Summary (October 2002), The Army as Client, LTC Craig Meredith, available at JAGCNET.
3. If a commander engages in unlawful activity, or intends to act, or refuses to act in some manner that violates his or her legal obligation and may be imputed to the Army, the lawyer shall proceed as is reasonably necessary in the best interest of the Army. This may include:

- a. Ask the official to reconsider.
  - b. Advise that a separate legal opinion be sought.
  - c. Advise official that his personal legal interests are at risk and he should consult counsel.
  - d. Advise that the lawyer has an ethical obligation to preserve the ethical interests of the service and must consider discussing the matter with supervisory lawyers.
  - e. Refer the matter to or seek guidance from higher authority.
- 4. In no event may the lawyer participate or assist in any unlawful activity. If the official persists, the lawyer may terminate representation with respect to the matter in question.
  - 5. The lawyer has an obligation to clarify the lawyer's role. The lawyer must identify the service as the client when it is apparent that the service's interests are adverse to that of the officer, employee or official. (Rule 1.13(e)).
  - 6. An SJA may not serve as the personal legal advisor to a commander on matters of alleged misconduct without the approval of the TJAG.

G. Communications with Third Parties.

- 1. A lawyer shall not discuss a case with another party who is represented by an attorney, except as authorized by law (Rule 4.2). *See Army Professional Responsibility Committee Opinion 93-2.*
  - a. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties.
  - b. Communication with a party concerning matters outside the representation is permissible.

2. Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have the authority to take or recommend action in the matter, provided the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. (ABA Formal Opinion 97-408)
  - a. The lawyer must give government counsel reasonable advance notice of his intent to communicate.
  - b. This affords the government counsel the opportunity for consultation with the officials to determine the advisability of entertaining the communication.
3. A lawyer is not precluded from communicating with a person who is not represented by counsel (Rule 4.3).
  - a. Lawyers may not state or imply that they are disinterested.
  - b. Lawyers should refrain from giving advice to unrepresented persons (Comment, Rule 4.3). *In re Pautler*, Case No. 01SA129, -P.3d-(Col. 2002).

H. Ex Parte Discussions with Military Judge (Army Rule 3.5).

1. A lawyer shall not communicate *ex parte* with a judge or court member except as permitted by law.
2. Example. Military judge initiates discussion with trial counsel on his performance in a suppression hearing *during a continuance in the case*. This was an improper *ex parte* communication between counsel and judge. *United States v. Copening*, [34 M.J. 28](#) (C.M.A. 1992).

3. Example. During an overnight recess, assistant trial counsel talked with the president of the panel about general military justice topics. It was unprofessional conduct to communicate privately with a member concerning a case prior to or during trial except as permitted by law. Though this conversation was not about the matter pending before court and did not violate letter of law, it was contrary to spirit of both legal and ethical prohibitions against improper contact with members. Because of the conversation's length and topic, it was improper. Military judge properly excused president. Trial counsel and military judge got praise for prompt and responsible action. *United States v. Hamilton*, [41 M.J. 22](#) (C.M.A. 1994).

#### **IV. OVERVIEW OF AR 27-1 INVESTIGATIONS – PROFESSIONAL RESPONSIBILITY COMPLAINTS.**

##### **A. Reporting Requirements.**

1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness must report the violation (Rule 8.3).
  - a. Knowledge = actual knowledge or knowledge inferred from the circumstances.
  - b. Substantial = material matter of clear and weighty importance and does not refer to the quantum of evidence presented.
2. Rule 8.3 does not require disclosure of information protected under Rule 1.6. (confidentiality). For example, in cases where there is an attorney-client relationship between an attorney and the offending attorney, usually in a legal assistance or TDS setting, the attorney does not have to report his client (the offending attorney).

##### **B. Professional misconduct defined (Rule 8.4).**

1. Violating or attempting to violate the Rules of Professional Conduct, or knowingly assisting or inducing another to do so;



2. Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
    - a. Not all criminal offenses constitute professional misconduct.
    - b. Concept of offenses involving moral turpitude is rejected under Rule 8.4.
  3. Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;
  4. Stating or implying an ability to influence improperly a government agency or official; or
  5. Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- C. Professional misconduct distinguished from personal misconduct.
1. Cases normally in the scope of AR 27-1.
    - a. Dishonesty – false claims, shoplifting, obtaining false official orders, firearms violations, stalking, or illegal surveillance.
    - b. Sexual misconduct – Bigamy, sexual relationships involving a conflict of interest, sexual crimes.
    - c. Insulting Behavior – Mismanaging by uttering insulting ethnic or sexual comments, displaying offensive visual material or by inappropriate touching of subordinates, clients, witnesses, or staff workers.
    - d. Dealing with Subordinates – Mismanaging by having personal business transactions with subordinates or imposing on subordinates for personal favors.
  2. Cases normally not in scope of AR 27-1.

- a. Discretionary Administrative Action – OERs, NCOERs, award recommendations, pass, or leave actions.
- b. Personal misconduct or questionable sexual activity (including adultery) unless it involves mismanagement or is a criminal act that reflects on fitness to practice law (i.e. having sex with a married client).
- c. DWIs or minor traffic offenses.
- d. Insulting Behavior – rudeness and name-calling unless directed toward judges or investigating officers or as listed in C.1.c., above.
- e. Conduct is being investigated as criminal misconduct, punishable under the UCMJ.

D. Processing Complaints (AR 27-1, Chap. 7, *See* Appendix A, Processing Chart).

- 1. Supervisory lawyers at all levels are responsible for reviewing all alleged or suspected violations of the Army Rules of Professional Conduct for Lawyers, or other applicable ethical standards that come to their attention.
  - a. Any credible alleged or suspected violation that raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer shall be reported through technical channels to the Chief, Standards of Conduct Office.
    - (1) Credible = reasonable belief that a violation occurred.
    - (2) Allegations may be resolved at the local level if there is no credible evidence of misconduct. Maintain a copy of any response sent to complainant and all associated documentation in office files.
  - b. Several supervisory JAs review allegations up to and including TAJAG before a formal preliminary screening inquiry (PSI) is ordered.

- (1) Each level conducts a credibility check.
- (2) No credible evidence – process stops.
- (3) Credible evidence – forward up the chain.

2. Preliminary Screening Inquiry.

- a. Purpose: To assist senior supervisory JAs in determining whether the questioned conduct occurred and, if it did, whether it constituted a violation of AR 27-26, or other applicable ethical standards.

- (1) Not intended to constitute an ethical investigation that most licensing authorities normally require lawyers to report.
- (2) But, it is the responsibility of the subject to know and comply with the reporting requirements of their licensing jurisdiction.

- b. Procedures.

- (1) OTJAG tasking to conduct an inquiry.
- (2) Senior Supervisory JA ( MACOM SJA or other JA in an equivalent supervisory position) appoints PSI officer (senior to subject).
- (3) PSI officer.
  - (a) Procedures set forth in AR 27-1 or AR 15-6 for informal investigations.
  - (b) Determine facts and circumstances of alleged or suspected violation.

- (i) Can delegate a subordinate officer to gather facts, question individuals, and collect documents.
    - (ii) PSI officer must independently review the facts.
  - (c) PSI officer provides written report to Senior Supervisory JA.
    - (i) Summarize facts.
    - (ii) Provide conclusions as to whether a violation occurred.
      - (a) Preponderance of the evidence.
      - (b) Evidence points to a particular conclusion as being more probably than any other conclusion.
    - (iii) Recommend corrective or disciplinary action, if appropriate.
    - (iv) Attach any documentary evidence or witness statements.
- c. Senior Supervisory JA action.
  - (1) Determine if the report is complete, if not return to PSI officer.
  - (2) Action on a complete report.

- (a) If no violation occurred, coordinate with Chief, SOCO and close the case and notify subject and complainant in writing and provide a copy of the report and correspondence to TJAG.
- (b) If only a minor or technical violation.
  - (i) Determine if counseling is appropriate.
  - (ii) If so, coordinate with SOCO and refer a copy of the report to the subject for comment.
  - (iii) Ensure counseling takes place.
  - (iv) Inform the complainant in writing of final action.
  - (v) Provide copy of PSI report and subsequent correspondence to TJAGSA.
- (c) More than a minor or technical violation.
  - (i) Refer the PSI report to OTJAG for further action.
  - (ii) OTJAG will refer the file to the subject for comment.

E. OTJAG Action.

1. TAJAG action.

- a. Return the file to the senior supervisory JA for further inquiry.
- b. Appoint a new inquiry officer for a supplemental inquiry.

- c. Determine there was no violation and return to Chief, SOCO to close.
- d. Determine that minor or technical violation occurred and either take appropriate action or direct referral to appropriate supervisory JA for specified action.
- e. Determine a substantial violation is clearly shown, take appropriate action and refer the file to TJAG for possible referral to state bar.
- f. Determine a substantial violation appears to have been committed and refer the file to the Professional Responsibility Committee for an opinion.

2. TJAG action.

- a. If TAJAG or the PRC committee refers the file, determine the appropriate action to be taken.
- b. Determine whether the conduct should be reported to the subject's licensing authority.
  - (1) Notify subject of intended action.
  - (2) Allow subject 10 days to show cause.

F. Due Process.

- 1. If action is to be taken at OTJAG.
  - a. Subject will get a reasonable time (usually 14 to 21 days) to provide comments.
  - b. Extensions may be granted for good cause by Chief, SOCO.
  - c. Failure to provide comments in the time provided will constitute waiver.

2. The subject is responsible to know and comply with the requirements of his or her licensing jurisdiction. The finding of even a minor or technical violation may trigger a reporting requirement imposed by subject's licensing authority, even if the initiation of the inquiry didn't.

G. Filing And Release Of Information.

1. SOCO maintains the files.
  - a. No PSI necessary – 3 years.
  - b. PSI conducted – 10 years.
    - (1) Shortened to 5 years pending approval of National Archives and Records Administration unless:
      - (a) Subject remains in JALS, or
      - (b) Is the subject of another monitoring, open, or founded file within 5 years of the closed date.
    - (2) Shortened to 3 years if unfounded or inquiry-not-warranted.
    - (3) One year after subject leaves JALS (founded files will be kept a minimum for 5 years after the closed date).
2. TJAG or TAJAG may file substantiated allegation in Career Management Information File (CMIF).
  - a. Relevant to individual's potential as a member of JALS.
  - b. Documents available to personnel managers.
    - (1) Subject provided notice IAW AR 600-37.
    - (2) Opportunity to rebut filing.

3. Release.
  - a. Release IAW with AR 25-55 and AR 340-1.
  - b. Normally, will not release outside DoD.
  - c. May release to civilian licensing authority if serious professional misconduct.
  - d. No public interest in investigation documents of prosecutor misconduct. *Mueller v. United States Department of Air Force*, [63 F. Supp. 2d 738](#); [1999 U.S. Dist LEXIS 14331](#). The documents were exempt from FOIA release because the requested documents would constitute a clearly unwarranted invasion of privacy.
  - e. May release to decision-makers within DoD.
    - (1) Promotion to Colonel/General.
    - (2) Involuntary Separation for professional dereliction.

## **V. APPLICABLE STANDARDS.**

### **A. Application.**

1. Military Rules of Professional Conduct apply to all judge advocates and civilian attorneys working under disciplinary authority of The Judge Advocate General. (Army rules apply to all attorneys whether military or civilian.)
2. Civilians.
  - a. The Army rules apply to civilian attorneys practicing before tribunals conducted pursuant to the UCMJ and the Manual for Courts-Martial.



- b. The Navy rules apply to civilian counsel representing members of the service in any matter under the cognizance of TJAG.
- c. The Air Force rules apply only to members of the Air Force, military and civilian, and not to Non-Air Force attorneys.

B. Effect of the Rules.

- 1. The Rules of Professional Conduct provide a basis for taking disciplinary action should a lawyer fail to comply with or meet the standard. The rules do not provide a basis for a civil cause of action against the attorney.
- 2. Attorneys must adhere to both the letter and spirit of the Rules.
- 3. Only the rules are binding. Comments to the Army and Navy rules, and discussion accompanying Air Force rules, provide guidance only in interpreting the rules, and are not binding themselves.
- 4. Rules are only one source of rules governing the conduct of judge advocates. (*See, e.g.*, UCMJ; Joint Ethics Regulation; JAGC Personnel Policies).

C. Other Sources of Ethical Rules.

- 1. Ethics code where licensed to practice law. "Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities." Rule 8.5.
- 2. Ethics code where practicing.

D. Conflict Rules.

- 1. **Rule 8.5** provides that if there is a conflict with state rules, the lawyer should seek assistance from his or her supervisory lawyer. If the issues remains unresolved, then:

- a. Rules supersede rules of licensing jurisdiction in the performance of official duties.
  - b. Rules do not control if attorney is practicing in state or federal civilian courts.
- 2. **ABA Model Rule 8.5**, as amended August 1993. Disciplinary authority must make a choice of law:
  - a. For conduct in connection with a court action, apply the rules of the jurisdiction where the court sits.
  - b. For other conduct, apply the rules of the jurisdiction in which the lawyer principally practices.

E. Resolving Conflicts.

- 1. Judge advocates should follow the most restrictive standard. If a course of conduct is permitted under one standard and mandatory under another standard, follow the mandatory standard.
- 2. Consider practical alternatives.
  - a. Find the client new counsel.
  - b. Seek exception from state bar.
- 3. If conflict is irreconcilable, follow Rule as required by Military Rule 8.5.

## VI. DUTIES OF SUPERVISORS AND SUBORDINATES.

A. Supervisors must ensure subordinates comply with Rules (Rule 5.1).

- 1. Includes non-lawyers under supervision (Rule 5.3). *See also* AR 27-3, para. 4-8b.

2. For Army attorneys: Staff judge advocates must ensure that lawyers under their supervision receive a minimum of three hours annual training on the Army Rules or other applicable ethical standards. *See* TJAG Policy Memorandum. *See also* AR 27-3, para. 2-4b (all attorneys authorized to provide legal assistance should receive some training in legal assistance since they may be called upon with little or no notice to perform such duties).
- B. A supervisor assumes imputed responsibility for acts of subordinates if:
1. the lawyer orders or ratifies a subordinate's violation, **or**
  2. the lawyer knows of the violation and fails to take remedial action to avoid or mitigate the consequences of a violation.
- C. Subordinates are bound by the Rules of Professional Conduct (Rule 5.2).
1. Subordinate may rely on ethical judgment of a supervisor if the issue is subject to question.
  2. If the ethical question can be answered only one way, subordinate must comply with the Rules even if supervisor directs a contrary course of conduct.
  3. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence (Rule 5.4(e)).

## **VII. CASE LAW IN PROFESSIONAL RESPONSIBILITY.**

- A. Impartiality of the Tribunal (Rule 3.5 and CANON 3 of ABA Code of Judicial Conduct).
1. Judges shall be patient, dignified, and courteous; plus, require the same of lawyers.
  2. Judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice.

*United States v. Quintanilla*, [56 M.J. 37](#) (2001). **Facts:** The CAAF ruled that the military judge had abused his discretion when he failed to recuse himself *sua sponte* after his actions in the case created the appearance of bias. The judge created this appearance when he became involved in a series of out-of-court confrontations with a civilian witness that resulted in him becoming the subject of a stipulation of fact. Additionally, he engaged in an *ex parte* discussion with the trial counsel. The confrontations with the civilian witness involved the military judge using profanity towards and initiating physical contact with the witness. The *ex parte* discussion with the trial counsel involved a strategic decision on the order of questioning of a witness. The judge then failed to fully disclose the facts behind the witness confrontation on the record and gave no disclosure to the defense of the *ex parte* discussion.

**Held:** The CAAF ruled that the military judge's failure to fully disclose the facts behind these two encounters on the record deprived the parties of the ability to effectively evaluate and raise the issue of judicial bias. Therefore, the CAAF refused to find that the defense had knowingly waived this issue. With respect to the *ex parte* discussion with the trial counsel involving the order of questioning of a witness, the CAAF noted that the discussion involved more than a mere administrative discussion and was therefore inappropriate. In addressing an appropriate remedy, the CAAF stated that it was unable to determine if the appellant suffered prejudice due to the incomplete facts in the record of trial. Accordingly, they remanded the case for a Dubay hearing.

*United States v. Butcher*, [56 M.J. 87](#) (2001). **Facts:** The CAAF reviewed whether the military judge should have recused himself after the defense objected to his social interactions with the trial counsel that occurred during the trial. These social interactions involved the military judge and his wife attending a party at the trial counsel's house and the judge having the trial counsel as his doubles partner in a tennis match. There were no discussions about the appellant's case other than a comment by the military judge that the trial was lasting longer than he had anticipated.

**Held:** In their opinion, the CAAF reaffirmed that when reviewing a judge's decision on recusal, the standard of review they would apply is the abuse of discretion standard. In reviewing the judge's actions in the present case, the CAAF stated that they would "assume, without deciding, that the military judge should have recused himself...." However, after applying the three factors in Liljeberg v. Health Services Acquisition Corp., [486 U.S. 847](#) (1988), the CAAF decided against reversal. In summary, the court found that: 1) "the risk of injustice to the parties" was greatly diminished since the judge's actions took place after the presentation of evidence and instructions on the merits; 2) "the risk that denial of relief will produce injustice in other cases" is unlikely since judges are "highly sensitive" to the problems caused by out-of-court

contact with the parties during litigation and, therefore, there is no need to send them a message by reversing this case; and 3) “the risk of undermining the public’s confidence in the judicial process” was not a danger since the judge’s conduct did not involve intimate personal relationships, extensive interaction, and occurred late in the trial.

B. Prosecutorial Conduct.

1. The duty of the prosecutor is to seek justice, not merely to convict. ABA Standard 3-1.2c; Air Force Standard 3-1.1c.
2. Prosecutors should not:
  - a. Intentionally misstate the evidence or mislead the jury as to the inferences it may draw from the evidence. Army Rule 3.4(e); ABA Standard 3-5.8(a); Air Force Standard 3-5.8(a).
  - b. Express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. Army Rule 3.4(e); ABA Standard 3-5.8(b); Air Force Standard 3-5.8(b).
  - c. Make arguments calculated to inflame the passions or prejudices of the jury. ABA Standard 3-5.8c; Air Force Standard 3-5.8c.
  - d. Make arguments that would divert the jury from its duty to decide the case on the evidence. ABA Standard 3-5.8(d); Air Force Standard 3-5.8(d) (also prohibits arguments which inject issues broader than guilt or innocence of accused under controlling law, or makes predictions of the consequences of the court members’ findings).

*United States v. Thompkins*, [58 MJ 43](#) (2003). **Facts:** The appellant was tried by a general court-martial composed of officer members for his involvement in a group brawl that resulted in a civilian bystander being wounded by gunfire, and for his disobedience of a subsequent no contact order. Pursuant to a defense motion, the military judge ruled that no government witnesses could talk about Airman Tabois and that the government could not produce evidence that the appellant lacked a driver’s license at the time of the incident. Additionally, the judge suppressed one of the pictures of the shooting victim that the government planned to

introduce. During the assistant trial counsel's opening statement, the military judge sustained two defense objections to its argumentative nature. On two other occasions, the military judge *sua sponte* cautioned the assistant trial counsel not to make conclusions or to characterize the evidence. The assistant trial counsel's actions eventually caused the military judge to provide curative instructions to the panel regarding the nature of opening statements.

During the testimony of the shooting victim, the assistant trial counsel asked the victim how the removal of the bullet from his arm had impacted him, but withdrew the question in response to a defense objection. The assistant trial counsel then handed the victim the previously suppressed photograph and asked him to identify it. The military judge immediately called an Article 39(a) session at which she admonished the assistant trial counsel for his actions. The military judge denied the defense motion for a mistrial citing to the fact that the panel members had not seen the photograph and the errors in the opening statement were due to inexperience, not malice on the part of the assistant trial counsel. The military judge then instructed the members to ignore any mention of the suppressed photograph.

During a special agent's testimony concerning the investigation, he made reference to Airman Tabois. The military judge called another Article 39(a) session where she chastised trial counsel for not complying with her earlier ruling regarding not mentioning Airman Tabois. When the special agent resumed his testimony, he mentioned that the appellant had to move to the passenger side of a vehicle because he was not a licensed driver. Defense counsel objected to this reference and asked for another Article 39(a) session at which he renewed his motion for a mistrial. The military judge admonished trial counsel again, but denied the motion for a mistrial, deciding instead to issue another curative instruction and to prohibit trial counsel from conducting a redirect of the witness following defense counsel's cross examination.

**Held:** The CAAF stated that it only overturns a military judge's refusal to grant a mistrial if there is clear evidence of an abuse of discretion. In analyzing cases of prosecutorial misconduct, the court said analysis must focus on the overall effect of counsel's conduct on the fairness of the trial, and not on counsel's personal blameworthiness. Additionally, the court noted that a mistrial is a "drastic remedy" that should be used only to prevent "manifest injustice." In examining the overall effect of counsel's conduct in the present case, the CAAF felt that the ameliorative actions taken by the military judge insured the impartiality and fairness of the appellant's trial. Therefore, the military judge did not abuse his discretion by refusing to grant a mistrial. Decision affirmed.

C. Competence & Diligence (Rules 1.1 & 1.3).

*Wiggins v. Smith*, [123 S.Ct. 2527](#) (2003). **Facts:** Petitioner was convicted of capital murder by trial judge. He elected to be sentenced by a jury, which sentenced him to death. His public defenders moved to bifurcate the sentencing proceedings seeking to show that Wiggins did not kill the victim by his own hand and then, if necessary, to present a mitigation case. The trial judge denied the motion. Although, one of the petitioner's public defenders told the jury that they would hear about Wiggins' difficult life, the defense did not present any such evidence. Wiggins argued that his counsel were ineffective for failing to investigate and present mitigating evidence about his troubled background.

**Held:** In 7-2 opinion, Court reversed death penalty sentence due to ineffective assistance of counsel (IAC) in the sentencing proceeding. Applying the two-pronged test for IAC set forth in *Strickland v. Washington* (IAC = deficient performance + prejudice), Court held that the failure of Wiggins' defense counsel to conduct a presentence investigation into potential mitigating evidence for presentment during the sentencing proceeding fell below professional standards prevailing in the state of Maryland in 1989 (where Wiggins was tried). Those standards included retention of a forensic social worker to prepare a social history report. The Court found prejudice, -- a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different -- due to the powerful nature of the unrepresented evidence: severe privation and abuse while in the custody of his alcoholic, absentee mother; and physical torment, sexual molestation, and repeated rape while in foster care. The Court referred to this type of evidence as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Here, the failure to investigate "resulted from inattention, not reasoned strategic judgment." "Wiggins sentencing jury heard only one significant mitigating factor -- that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."

D. Confidentiality (Rule 1.6).

*United States v. Dorman*, [58 M.J. 295](#) (2003). **Facts:** Pursuant to his pleas, appellant was convicted of numerous drug related offenses. Once appellant's case was docketed at the Air Force Court of Criminal Appeals (AFCCA), he hired a civilian defense counsel to assist in his appeal process. As part of his preparation, the civilian counsel asked Dorman's trial defense counsel for her copy of the appellant's case file. The civilian defense counsel informed the trial defense counsel that he had a signed release from the appellant granting access to the entire file. Although the trial defense counsel initially indicated her willingness to cooperate, she eventually refused to release the file to the civilian defense counsel. This refusal was sustained by the AFCCA. In response, the civilian attorney filed a motion with the CAAF to compel production of the file.

However, before the CAAF could rule on the motion, the trial defense counsel produced the file and the motion was subsequently withdrawn.

**Held:** Prior case law held that in cases where the appellant raised an ineffective assistance of counsel claim against his trial defense counsel, that counsel had to provide appellate defense counsel reasonable access to the case file. In considering whether to expand this access to cases where no ineffective assistance of counsel claim was made, the CAAF focused on two established concepts of law. The first is that individuals accused of crimes have the right to the assistance of counsel through the completion of their appeal process. The second is that the duty of loyalty owed to a client by his trial defense counsel continues through the appeal process. In order to abide by these concepts of law, the CAAF held that trial defense counsel must provide reasonable assistance during the appellate process and must not interfere with the appellate defense counsel's representation of their former clients. In order to protect the trial defense counsel from violating their ethical duty of confidentiality when complying with its opinion in this case, the CAAF held that release of the case file is not required until trial defense counsel have received the client's written release. If trial defense counsel feel that release of certain information from a file would "create a material risk" to the client, they should inform the client of this and offer alternative solutions. Finally, the Court recognized that there may be situations where withholding of information may be appropriate. This could include information the lawyer was provided on a promise of confidence, or information whose release is restricted by statute or court order, such as classified information or documents covered by protective orders. To obtain these documents, the appellate counsel must go through the established procedures designated by the governing statute or court order. Despite the error by trial defense counsel, the CAAF affirmed the lower court's decision because the appellate defense counsel eventually received all of the requested information and the appellant failed to demonstrate material prejudice to any of his substantial rights.

E. Candor Toward the Tribunal (Rule 3.3).

*United States v. Baker*, [58 M.J. 380](#) (2003). **Facts:** During the defense case-in-chief of a contested special court-martial before officer members, the military judge conducted an Article 39(a) session to discuss the request of appellant's two defense counsel to be removed from the case. After confirming her suspicion (through a discussion on the record with both defense counsel) that the reason for the request to withdraw was due to the counsels' concerns about their client committing perjury, the military judge began a discussion with the appellant as to how the trial would proceed if he chose to testify. The military judge told the appellant he would have to testify without the assistance of counsel, would be cross-examined by trial counsel and questioned by members without the assistance of counsel, and that his defense counsel could not use anything he said in his testimony in their closing argument. The military judge refused to allow



either defense counsel off the case. Instead, she instructed both defense counsel to prepare a memorandum for the record outlining the situation both before and after the appellant's testimony. The military judge informed the appellant that these memoranda would be retained in counsels' files, but would become releasable if the appellant raised an ineffective assistance of counsel claim. Despite the military judge's instruction, neither defense counsel prepared such a memoranda. The appellant eventually testified in a narrative form, and responded to questions from both the trial counsel and the military judge.

**Held:** The CAAF adopted the standard that defense counsel must have a "firm factual basis" to believe their client is going to commit perjury before being required to take action under the ethical standards. Once this basis is satisfied, the court stated that the proper approach for defense counsel is to provide non-specific notice to the court that the client will testify in a narrative form without the assistance of counsel, and further, the defense counsel will not refer to any of his client's testimony during closing argument. Due to the fact that there was no direct evidence on the record as to why the defense counsel requested to withdraw and allowed their client to testify in a narrative form, and that counsel failed to complete the memoranda for record ordered by the court, the CAAF felt it was unable to determine whether the appellant was denied his right to effective assistance of counsel. As such, the CAAF set aside the decision of the service court and remanded the case for a *DuBay* hearing. The CAAF went on to proscribe helpful procedures for defense counsel and military judges in future cases when they are faced with client perjury issues in court.

F. Conflict of Interest.

*United States v. Cain*, [59 M.J. 285](#) (2004). **Facts:** Appellant was convicted pursuant to his pleas of two specifications of indecent assault in violation of Article 134, UCMJ. On initial review, the appellant alleged that he and his lead military defense counsel (MAJ S) had a coerced homosexual relationship that denied him effective assistance of counsel. The Army Court ordered a *DuBay* hearing to determine the underlying facts. The relevant facts found were: MAJ S and the appellant entered into a consensual sexual relationship shortly before the Article 32, UCMJ investigation; the relationship continued until the conclusion of the trial about six months later; appellant told several people about the relationship, including two civilian attorneys, who told appellant that he should fire MAJ S because counsel's behavior was unethical and illegal; appellant did not fire MAJ S because he believed that he was the best military defense counsel available; subsequently, MAJ S detailed CPT L to the case at appellant's request because appellant thought he should have two counsel (given that there were two trial counsel); after consulting with the appellant and MAJ S (both of whom initially wanted to contest the case) and thoroughly reviewing the facts, CPT L initiated negotiations with the Government regarding a pretrial agreement; per the PTA, the accused pled guilty and was found guilty by a military judge sitting as a

general court-martial; four days later, appellant's parents, without appellant's knowledge, sent a letter to the convening authority alleging that MAJ S pressured appellant into sexual favors; twelve days later, LTC F, the TDS XO, informed MAJ S of the allegation; the following morning, MAJ S killed himself, leaving a message that he never "forced" the appellant to have sex with him and that his suicide was not an admission of guilt.

**Held:** In reviewing the facts of the case along with results of the *DuBay* hearing, the CAAF concluded the appellant was caught between the fear of exposing Major S's conduct and the appellant's "deep need . . . to believe his defense counsel would "save" him." The CAAF then discussed the various possible criminal and administrative consequences that both MAJ S and the appellant faced because of their sexual relationship, concluding that "Major S . . . engaged in a course of conduct with Appellant . . . which exposed both of them to the possibility of prosecution, conviction, and substantial confinement for the military crimes of fraternization and sodomy." Even if not tried by court-martial, the CAAF noted "the conduct initiated by Major S exposed him and Appellant to administrative proceedings that could have resulted in involuntary termination for homosexuality." The CAAF also noted the ethical considerations involving in the case, observing that MAJ S faced professional disciplinary action for his conduct with the appellant.

Notwithstanding the ethical considerations, however, the CAAF focused on possible criminal results of MAJ S's actions, holding that "[t]he uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." In so holding, the CAAF avoided the harder issue of the appellant's being required to show prejudice. In declaring that the relationship was a *per se* conflict, the CAAF suggested that the possible adverse consequences provided MAJ S with compelling motivation to place secrecy above trial strategy, thereby affecting his ability to provide objective advice to appellant on defense options. In reviewing Army Court's determination that even if there were a conflict that appellant waived it, the CAAF determined that neither civilian counsel whom appellant contacted "provided him with a detailed explanation of the relationship between the merits of the case and the attorney's ethical obligations." Therefore, "Appellant's conversations with the two civilian attorneys in this case did not involve the type of informed discussion of the specific pitfalls of retaining Major S that would demonstrate a knowing, intelligent waiver of the right to effective assistance of counsel."

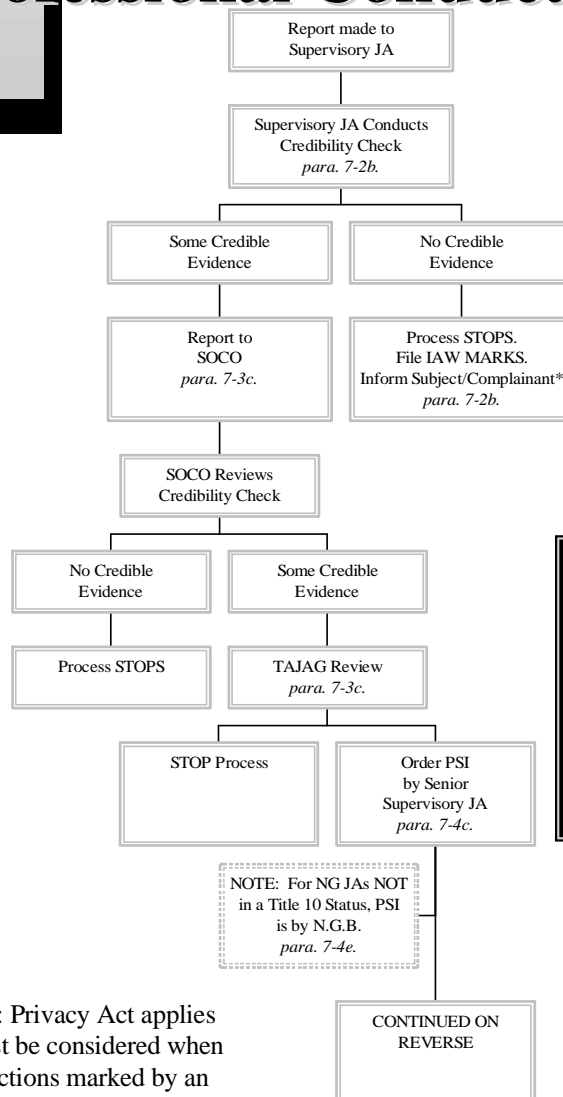
In its opinion, the CAAF did cite to *United States v. Babbitt* (civilian counsel had a heterosexual relationship with his client) and sought to distinguish it from the case at bar. The CAAF noted that in *Cain*, MAJ S abused his military office, violated his duty of loyalty, fraternized, and committed the same criminal offense for which the appellant was on trial.

## **VIII. CONCLUSION.**

## APPENDIX A

# P Professional Conduct Inquiries

*Chapter 7, AR 27-1, 3 Feb 1995*



### Notes

⇒Standard: Preponderance of Evidence (para. 7-3d.).

⇒Allegation is “credible” if info provides “reasonable belief.” (para. 7-2b.)

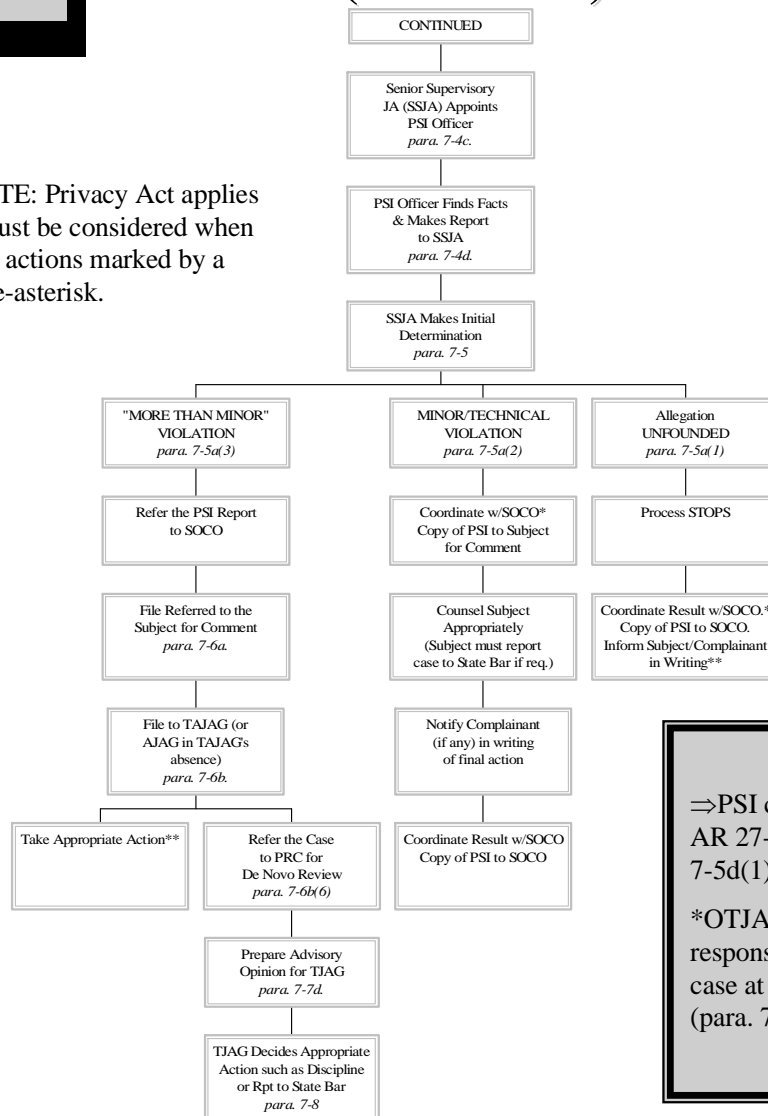
\*NOTE: Privacy Act applies and must be considered when taking actions marked by an asterisk.

# P Professional Conduct Inquiries

*Chapter 7, AR 27-1, 3 Feb 1995*

(continued)

**\*\*NOTE:** Privacy Act applies and must be considered when taking actions marked by a double-asterisk.



## Notes

⇒ PSI conducted IAW AR 27-1 & 15-6(para. 7-5d(1)).

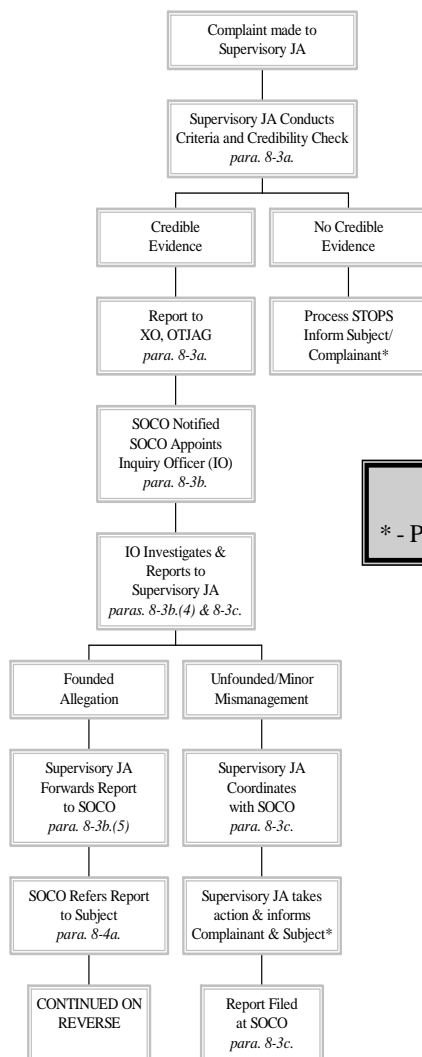
\*OTJAG may assume responsibility for the case at this point. (para. 7-5b.)

## APPENDIX B

# M

*Chapter 8, AR 27-1, 3 Feb 1995*

## Mismanagement Inquiries



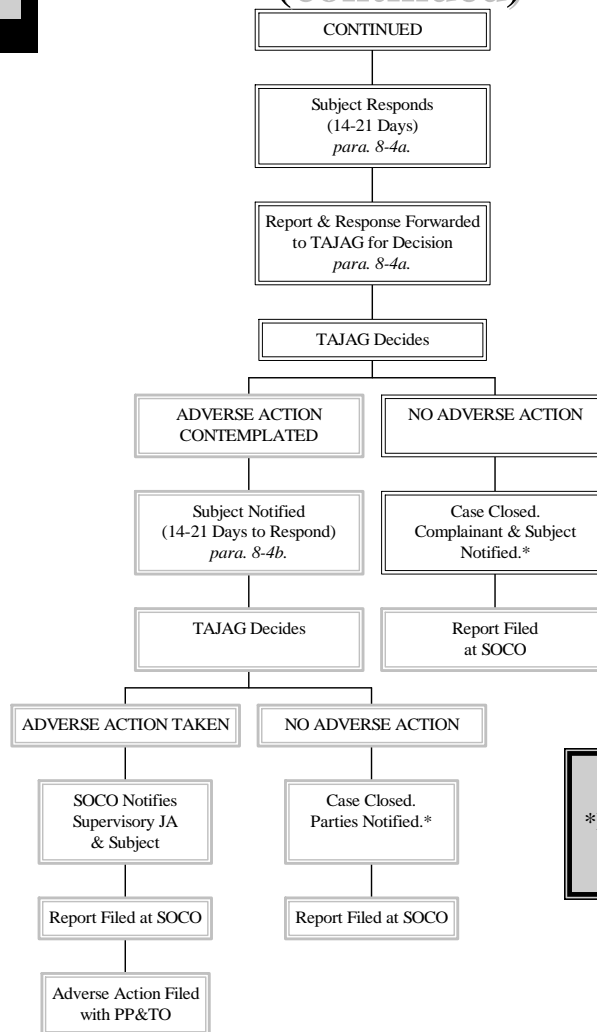
### Notes

\* - Privacy Act Applies

# M

*Chapter 8, AR 27-1, 3 Feb 1995*

## Personnel Management Inquiries (continued)



### Notes

\*Privacy Act Applies.

## APPENDIX C

### INFORMATION PAPER

DAJA-SC  
30 Sep 2002

SUBJECT: ABA Changes Concerning Multijurisdictional  
Practice of Law

1. Purpose. To inform Army Lawyers of the ABA's new multijurisdictional practice position and its potential impact on JAs and SJAs. See <http://www.abanet.org/cpr/mjp-home.html> and <http://www.crossingthebar.com/MJPUpdate92502.pdf>.

a. On August 12, 2002, the ABA House of Delegates approved amendments to the ABA Model Rules of Professional Responsibility (MRs). As the state bars enact the changes, the new MRs will remove doubts about the authority of military attorneys to practice across state lines as they provide their clients legal assistance and defense services on active duty, in the reserves, and in the National Guard.

b. New MR 5.5 allows lawyers to establish an office or other systematic and continuous presence in a jurisdiction in which they are not licensed to practice when the legal services are authorized to be provided by *federal law or other law of the jurisdiction*.

c. The new rules lay out some ideas for managing both litigation/pro hac vice and foreign-attorney unauthorized practice of law, and generally permit any non-litigation work that is incident to work done for a client in the attorney's jurisdiction of admission.

d. The ABA's recognition of an attorney's ability to practice outside the state wherein the attorney is licensed comes with a price regarding where the attorney can be disciplined. New Rule 8.5 makes it clear that a lawyer practicing temporarily and permissibly in a host jurisdiction is subject to the disciplinary authority of the host jurisdiction. Concomitantly, the Model Rules of Disciplinary Enforcement were also amended to reinforce the expectation that the lawyer's home jurisdiction will impose reciprocal discipline when the lawyer is disciplined in the host jurisdiction.

f. SJAs and military lawyers have an increased responsibility to know all of the state and federal ethics rules that apply to their subordinate attorneys, and to ensure there are no conflicts. Develop a course of action



which satisfies all sets of ethics rules: (a) Army Rules in AR 27-26; (b) rules of the state(s) wherein licensed; (c) rules of the litigation forum; and (d) rules of the state in which practicing.

g. SJAs and military lawyers should communicate with local bars and participate in their programs in order to benefit from a heightened understanding of and goodwill for the practice of our military attorneys.

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